

FILIPPINI RANCHING CO. AND PARIS RANCH

v.

BUREAU OF LAND MANAGEMENT

IBLA 95-481

Decided June 30, 1995

Appeal by the Bureau of Land Management from an order issued by Administrative Law Judge James H. Heffeman granting a motion to revoke the full force and effect of the livestock grazing management portion (N6-94-27) of the August 29, 1994, Final Multiple Use Decision of the Shoshone-Eureka Area Manager, Bureau of Land Management.

Order set aside and case remanded.

1. Grazing and Grazing Lands—Grazing Permits and Licenses: Appeals—Rules of Practice: Appeals: Board of Land Appeals—Rules of Practice: Appeals: Effect of

Under 43 CFR 4.477, the administrative law judge may either place his or her decision into full force and effect or revoke the full force and effect of a BLM decision only in the context of issuing a final decision on the merits of the pending appeal.

APPEARANCES: David K. Grayson, Esq., Assistant Field Solicitor, Office of the Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management; W. Alan Schroeder, Esq., Boise, Idaho, and William F. Schroeder, Esq., Vale, Oregon, for Filippini Ranch Company and Paris Ranch.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Bureau of Land Management (BLM) has appealed from a May 18, 1995, order issued by Administrative Law Judge James H. Heffeman following a 7-day hearing on the livestock grazing management portion (N6-94-27) of the Shoshone-Eureka Area Manager's Final Multiple Use Decision (FMUD) for the Cottonwood Allotment, issued on August 29, 1994. ^{1/} Judge Heffeman issued that order to confirm his oral ruling from the bench on May 17, 1995, (Transcript at 1184-1202). The order granted the motion filed by Filippini

^{1/} In an order dated May 10, 1995, this Board referred to the Hearings Division for consolidation with N6-94-27 an appeal (docketed with the Board as IBLA 95-113) of the wild horse management portion (N6-94-28)

Ranching Company and Paris Ranch (the Ranches) to revoke that part of the FMUD placing into full force and effect the livestock grazing management portion of the FMUD. ^{2/} Judge Heffernan did not issue a decision on the merits of the FMUD.

In its notice of appeal, BLM, in essence, makes two requests. First, BLM urges the Board to apply 43 CFR 4.477 and modify Judge Heffernan's order and reinstate the full force and effect of the grazing portion of the FMUD. Second, in the alternative, BLM asks the Board to stay Judge Heffernan's order in accordance with 43 CFR 4.21.

In response, counsel for the Ranches have filed a motion to strike the notice of appeal and a motion to strike the stay request. In the first motion, counsel charge that "there is no appealable decision" (Motion to Strike at 4). Counsel argue that Judge Heffernan's order is an interlocutory order from which there is no right of appeal because interlocutory appeals are available under 43 CFR 4.28 only upon a showing that the objectionable ruling involves a controlling question of law the appeal of which may materially advance the final decision. In this case, counsel assert that Judge Heffernan's ruling did not involve a question of law; rather, it was based on an evidentiary analysis that involved issues of credibility. In the absence of a final decision, counsel contend that the Board has no jurisdiction to entertain BLM's appeal.

In the second motion, counsel argue that because there is no appealable decision, the Board may not entertain a petition to stay under 43 CFR 4.21. Moreover, counsel point out that in National Wildlife Federation v. BLM, 128 IBLA 231 (1994), this Board held that the general regulation at 43 CFR 4.21 does not apply to appeals from grazing decisions, because a more specific regulation, 43 CFR 4.477, exists.

Initially, the arguments presented by the Ranches appear persuasive and to control our disposition of BLM's appeal. However, further review leads to the conclusion that we have jurisdiction in this case to entertain the appeal to allow us to set aside the action taken by Judge Heffernan and return the matter to him for a final decision.

fn. 1 (continued)

of the FMUD. Judge Heffernan intends to conduct a hearing on the wild horse portion of the FMUD and thereafter issue a decision addressing

both portions of the FMUD. See May 18, 1995, Order.

^{2/} In a transmittal memorandum dated June 7, 1995, Judge Heffernan construed BLM's notice of appeal to cover "both of the now-consolidated dockets, that is, Grazing and Wild Horse Decisions, N6-94-27 and N6-94-28, IBLA 95-113" (Transmittal Memorandum at 2). He then stated: "Consequently, I return to the Board both dockets, having been jurisdictionally deprived of the opportunity to continue and convene the hearing with respect to the Wild Horse docket." Id. at 3. We do not construe BLM's notice of appeal so broadly. Nor do the Ranches (Motion to Strike the Notice of Appeal at 7).

This conclusion rests on our analysis of 43 CFR 4.477, the grazing procedural regulation which we held in National Wildlife Federation v. BLM, *supra*, supersedes 43 CFR 4.21(b). Regulation 43 CFR 4.477 is titled, "Effect of decision suspended during appeal." Subparagraph (a) of the regulation provides that an appeal will suspend the effect of a decision pending final action on the appeal "unless the decision appealed from is made immediately effective." Subparagraph (b) then provides notice of the relevant standard to be applied in making a grazing decision effective immediately and the process by which BLM, an administrative law judge, or this Board can do so.

In William J. Thoman, 120 IBLA 302 (1991), the Board found that the applicable standard for placing grazing decisions into full force and effect is contained in the language of 43 CFR 4160.3(c), which is cross-referenced in 43 CFR 4.477(b). We stated at 304: "[A] decision by an authorized officer of BLM, an Administrative Law Judge, or the Board to place a decision into full force and effect under 43 CFR 4.477(b) pending the outcome of an appeal must be based on a finding that an emergency situation involving resource deterioration exists."

If the authorized officer determines that the standard is met, he "may provide initially in his decision that it shall be in full force and effect pending decision on an appeal therefrom". 43 CFR 4.477(b)(1). An administrative law judge "may provide in the decision on an appeal before such officer that it shall be in full force and effect pending decision on any further appeal" (emphasis added). 43 CFR 4.477(b)(2). The Board may provide "by interim order that any decision from which an appeal is taken shall be in full force and effect pending final decision on the appeal" (emphasis added). 43 CFR 4.477(b)(3).

Thus, by regulation, upon a finding that the applicable standard has been met, the authorized officer may put his or her decision into full force and effect in the decision itself. Where a BLM decision is appealed to an administrative law judge, the judge may provide in the decision on appeal that his or her decision is in full force and effect. Such action may occur when the administrative law judge affirms the decision of the authorized officer and specifically continues the full force and effect, or full force and effect may originate with the administrative law judge's decision, if the authorized officer had not placed the decision into full force and effect. On appeal to the Board, the decision being appealed may be placed in full force and effect by the Board in an interim order pending its final disposition of the case. It follows that the procedure for revocation of the full force and effect of a decision by an administrative law judge or the Board should follow the regulatory scheme.

The regulation specifically provides that if an appeal lies in the Department to a superior authority, a decision will not be considered final agency action subject to judicial review under 5 U.S.C. § 704 (1988), "unless it has been made effective pending a decision on appeal in the manner provided in this paragraph." Accordingly, an appellant may

immediately seek judicial review (1) where the authorized officer puts his or her decision into immediate effect; (2) where an administrative law judge puts his or her decision into full force and effect; or (3) where the Board issues an interim order placing the decision appealed to it in full force and effect.

The regulations contain no provision allowing the administrative law judge to issue an interim order placing the authorized officer's decision into full force and effect. The regulation contemplates full adjudication by the administrative law judge and the decision, if it is placed into full force and effect, will be that of the administrative law judge.

In this case, the authorized officer placed the FMUD in full force and effect. The Ranches filed suit in United States District Court for the District of Nevada seeking, inter alia, a temporary restraining order (TRO) or a preliminary injunction precluding BLM from enforcing its decision. Filippini Ranching Co. v. Babbitt, CV-N-94-0640-ECR. The court denied those requests. In examining the possibility of irreparable harm and balance of hardships, the court stated:

Any hardship or loss suffered by Plaintiffs in removing 92 head of cattle from the Cottonwood Allotment is primarily an economic loss. On the other hand, overgrazing can cause serious and long lasting effects. The public's interest in maintaining the integrity of its lands outweighs Plaintiff's interest in keeping 92 cows on the allotment. The potential hardship to be suffered by the public – permanent or long lasting damage to the land – outweighs the largely economic and hence compensable hardship which Plaintiffs face.

(Attachment 3 to the Notice of Appeal, Minutes of the Court, dated Sep. 23, 1994, at 4.)

In ruling that the Ranches had failed to show a probability of success on the merits or a serious question going to the merits, the court stated: "[T]here is ample evidence to indicate the BLM had a rational basis for determining the Cottonwood Allotment was in an emergent condition and needed immediate action to stop resource deterioration." Id. at 6. ^{3/}

By order dated December 29, 1994, the court denied reconsideration of its earlier order stating on page 4: "We continue to conclude that plaintiffs have not met their burden for a T.R.O. or a Preliminary

^{3/} In response to the Ranches' argument that even if an emergency condition exists in the allotment, BLM did not cite that as the basis for immediately implementing its FMUD, the court held that on page 16 of the FMUD, BLM had cited the controlling language of 43 CFR 4160.3 and that "even if the August 29 decision nowhere explicitly says 'a state of emergency exists' it is implicit within the decision. See Bar X Sheep Co., 56 IBLA 258, [2]71 (July 24, 1981)." Id. at 5.

Injunction." The court further stated on page 4: "Since we find that the BLM has properly found and declared an emergency, the pending appeal from the final decision of August 29 will not suspend the effect of the final decision."

Under the regulatory construct, a person who is adversely affected by a BLM grazing decision may appeal that decision to an administrative law judge. If the decision is placed in full force and effect, that person may also seek immediate judicial review, as the Ranches did in this case. Following any hearing and consideration of the record in the case, the administrative law judge may provide that his or her decision is in full force and effect. Therefore, if the Ranches had been successful in persuading the court to issue an order granting a TRO or temporary injunction, Judge Heffernan could, in a decision sustaining BLM's decision, place his decision into full force and effect. However, where the court, as in this case, has refused to issue a TRO or a preliminary injunction, that action must be controlling until resolution of the administrative appeal.

In this case, Judge Heffernan has not issued his decision on the merits of the Ranches' appeal; nevertheless, he has issued an order revoking the full force and effect of BLM's decision. Under the Ranches' interpretation of the applicable law and regulations, BLM is without a remedy. It cannot go to court and, the Ranches argue, this Board has no jurisdiction to entertain an appeal of Judge Heffernan's order because it is an interlocutory order that does not involve a controlling question of law.

[1] Under our interpretation of 43 CFR 4.477, the administrative law judge may either place his or her decision into full force and effect or revoke the full force and effect of a BLM decision only when he or she issues a final decision on the merits of the pending appeal. The logic of such an interpretation is simple—it protects the rights of all parties. If the administrative law judge puts his or her decision into full force and effect, an appeal may be taken to this Board and/or judicial review of that decision may be immediately sought. If the administrative law judge revokes the full force and effect of the BLM decision by overturning it on its merits, BLM has the right to appeal to this Board, thereby suspending the effect of that decision in accordance with 43 CFR 4.477(a). In either case, remedies are available to the parties to challenge the action taken. ^{4/}

^{4/} We recognize that the regulation also states that "[a]ny action taken by the authorized officer pursuant to a decision shall be subject to modification or revocation by the administrative law judge or the Board upon an appeal from the decision." Although Judge Heffernan cited that sentence of the regulation as providing the authority for the issuance of his order in the case (Transcript at 1186), we do not construe that sentence, when read in the entire context of 43 CFR 4.477, as providing authority for the administrative law judge to revoke the full force and effect of a BLM decision in an interim order.

Clearly, this Board's jurisdiction is appellate in nature and we have jurisdiction only where a final decision or order has been issued. However, we must reject the argument in this case that Judge Heffernan's order is interlocutory in nature and not appealable. We conclude that because Judge Heffernan attempted to bifurcate his decision on full force and effect from his decision on the merits, his order is final action on full force and effect, which is appealable to this Board.

Based on our analysis of 43 CFR 4.477, as set forth above, we conclude that Judge Heffernan had no authority to rule on full force and effect, as he did in his May 18, 1995, order, independent of action on the merits of the appeal. Since he had no authority, we must set aside that order.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the order appealed from is set aside and the case returned to Judge Heffernan for issuance of a final decision. 5/

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Franklin D. Amess
Administrative Judge

5/ The Ranches' motions to strike are denied as moot. BLM filed a request for an extension of time within which to file a statement of reasons. In light of our disposition, that request is denied.